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Nos. 80-965, 80-1018

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-965

TEXACO, INC., et al., ... Appellants

versus

LOUISE F. SHORT, ... Appellee
STATE OF INDIANA, ... Intervenor

No. 80-1018

EDEN H. POND, et al., ... Appellants

versus

ULYSSES G. WALDEN, JR., et ux, . . . Appellees
LOUISE F. SHORT, ... Intervenor

Appeals from the Supreme Court of Indiana

JOINT BRIEF OF APPELLEES, LOUISE F. SHORT, INTERVENOR, AND STATE OF INDIANA

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QUESTIONS PRESENTED FOR REVIEW

1. Can the State, in the exercise of its police power, require the claimant of an untaxed, undeveloped and otherwise dormant mineral right to register his claim in a local county recorder's office once each twenty (20) years on penalty of forfeiture, without also providing a means or process calculated to give such claimant actual notice of the registration requirement?

2. Can the registration requirement be imposed retroactively by providing, in lieu of actual notice of the law to claimants, a two-year grace period for filing claims after the effective date of the law?

3. Can the state, without denying equal protection, provide a means whereby the owner of ten (10) or more such interests in the same County who has filed timely claims on other interests in said County, but fails to file on a particular interest through inadvertence, may nevertheless preserve such interest by a prompt filing after receiving actual notice of such failure to record a claim as to that particular interest?

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IN THE

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Nos. 80-965, 80-1018

No. 80-965

TEXACO, INC., ROBERT BRASELTON, ELECTRA FIELDS, CHARLES BRASELTON, CHESTER BRASELTON, ROBERT E. BRASELTON, CLIFFORD N. BRASELTON, OSBORNE T. BRASELTON, JR., DAVID E. BURKHART, JOHN P. BRASELTON, ROSA G. BURKHART, D. W. MAYHEW d/b/a MAYHEW OIL AND GAS DEVELOPMENT, - - - - - - - - - *Appellants*

v.

LOUISE F. SHORT, - - - - - - - - *Appellee*
STATE OF INDIANA, - - - - - - *Intervenor*

No. 80-1018

EDEN H. POND,
EDNA H. BOBE,
CONSOLIDATION COAL COMPANY - - - *Appellants*

v.

ULYSSES G. WALDEN, JR.,
CAROLYN SALLEE WALDEN, - - - - - *Appellees*
LOUISE F. SHORT, - - - - - - - *Intervenor*

APPEALS FROM THE SUPREME COURT OF INDIANA

JOINT BRIEF OF APPELLEES, LOUISE F. SHORT, INTERVENOR, AND STATE OF INDIANA

STATEMENT OF THE CASE

Appellees SHORT and WALDEN are sometimes referred to in this brief for convenience as the "landowners", and Appellants are similarly referred to as the "mineral claimants". The landowners acquiesce in the mineral claimants' statement of the case with the following exceptions:

(a) The mineral claimants in *Texaco* made a delayed recording of their claim within sixty (60) days after receiving actual notice of extinguishment. It is true, as indicated by Texaco's brief, that under the stipulation the mineral claimants in that case did not own ten (10) or more interests in the County. The stipulation does not show, however, that these claimants made any effort whatever to preserve their unused interests, or file other statements of claim, or that the failure was due to inadvertence as that term is used in the statute. Thus, contrary to Texaco's contention, the Court could not and did not find that Texaco's failure to bring itself within the requirements of the "ten interest exception" was due solely to the fact that it owned fewer than ten interests.

(b) Unlike the Texaco claimants, the mineral claimants in *Pond* did not record notices of claim at any time prior to commencement of the current litigation.

(c) The mineral claimants elected, in both cases, to test the constitutionality of the Act without tendering any evidence concerning the general nature and effect of the problem and the effect of the legislative remedy. Accordingly, the constitutional issue must be tested under any state of facts which may reasonably be assumed to exist.

SUMMARY OF THE ARGUMENT

State court decisions in several mineral-producing states have permitted unused, severed mineral rights, unlike any other class of property, to become virtually immune from loss, abandonment, tax sale or termination in any other manner. This immunity, coupled with economic factors, geologic uncertainties, and changing extraction technologies has substantially hindered both the development of the minerals and of the land for other purposes. The State has addressed the problem through its Dormant Mineral Act. This act, although perhaps not the only or even best solution, is nevertheless reasonably related to a legitimate legislative objective, i.e., restoring the integrity of land by (1) extinguishing abandoned mineral claims, and (2) making public the names and addresses of the owners of such claims as are not abandoned. Accordingly, the Act satisfies the requirement of substantive due process.

Like most regulatory legislation in the realm of property law and choses in action, the Act is self-executing, retroactive, and generally unforgiving. Also, like most similar legislation, it provides a reasonable grace period and simple procedure for those potentially affected by its provisions to exercise or preserve their existing prerogatives. So long as the grace period is reasonable, retroactivity does not offend due process and the procedural safeguards of notice and hearing need not be incorporated in the Act. The grace period concept is firmly rooted in precedent and is a valuable and necessary alternative to actual notice where legislation affects the vested rights of persons widely scattered and not readily identifiable.

Properly interpreted, Section 5 of the Act permitting an owner of ten (10) or more claims in the same County the opportunity to correct inadvertent filing errors, is not

unlawfully discriminatory. This section recognizes that certain owners of large numbers of long term claims, particularly in coal, would likely, while attempting to comply with the Act, make clerical errors of identification and perhaps even omission in their filings. The intent of the legislature was that such errors not be prejudicial to the claimant. The choice of ten (10) interests as the point at which such errors are likely to occur even when due diligence is exercised was, as opposed to any other number, a legislative judgment. In the local economic sphere, such judgments need only be rationally related to a legitimate classification. Mathematical exactitude is not required.

Extinguishment of a property or contract right in the legitimate exercise of the police power is not equivalent to a governmental taking when simple provision is made and time given for affected persons to avoid the forfeiture. In this case, the twenty-year initial term of the interest, the two-year grace period, and the simple refiling procedure for preservation saves the Act from 'condemnation' as a legislative taking without compensation.

In matters concerning property rights, (enforceable against the world), as opposed to contract rights, (enforceable only between contracting parties and their privies), the constitutional standard for contract impairment is substantive due process. Thus, if the legislature approaches a legitimate legislative concern in a rational way, the incidental limitations on private contract rights must give way to the public interest.

ARGUMENT

I. INTRODUCTION

Absolute acceptance by the Courts of mineral producing States (save only Louisiana and California) of the

notion that severance of and commerce in speculative mineral rights somehow promotes the industry has resulted in a concept of a mineral estate which is both unique, and, in some respects, fictional. An unused mineral right is the only "property" in our entire legal system with all of the following attributes:

1) It cannot be abandoned.
2) It cannot be lost to an adverse possessor.
3) It may be held in perpetuity without use or development and is an estate of inheritance.
4) The estate may exist even though there is or may, in fact, be no res, (e.g., no oil, gas or coal) for the property rights to attach to or the quantity or quality thereof may be such that the res has no economic value.
5) The property right exists even though the owner thereof knows not whether the res has value or even exists.
6) The estate continues to exist even after the mineral has been extracted.

These attributes, together with historical factors related to economics and technology, have created a serious land problem. The legislatures of Indiana and many other States have attempted to resolve this problem in a direct, expeditious and fair-minded manner through Dormant Mineral Acts.[1]

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[1]The nature and extent of the problem is different in different States and geographical areas and may well call for different resolutions. For example, in Pennsylvania and Virginia, the coal industry developed prior to 1800 and oil by 1860—times when public record keeping was non-existent or, at best, unreliable. In Indiana,

(Footnote continued on next page)

Counsel, in *Pond*, argues that severed mineral rights should escheat to the State or that forfeiture should be preceded by "a simple administrative or judicial proceeding" instituted by someone other than the mineral claimant. The first contention is contrary to our entire history of public policy toward land titles. We do not transfer stale land claims to the State—we simply extinguish them. See, e.g. 43 U.S.C.S. § 1744; also, *Jackson* v. *Lamphire* (1830) 28 U. S. 280. The Indiana Supreme Court recognized this policy in the cases at bar in the following language:

(Footnote continued from preceding page)
Illinois and Michigan, the industries developed between 1830 and 1900, and in the more Western States between 1920 to 1950. In the latter States, record keeping is somewhat better, but varies widely on a local basis, and, of course, fewer generations of successive owners have become involved. Similarly, some States, such as Indiana, have only a few counties involved in mineral production and contribute only small percentages of the total national output while others, such as Texas (oil) and Kentucky (coal), contribute major shares. Likewise, the extent of proved reserves in geographic areas involved varies widely from State to State. Of total U. S. proved oil reserves, more than one-fourth is in Texas while about 6/100 of 1% is in Indiana. See *U. S. Crude Oil and Natural Gas Reserves, 1977 Annual Report*, Energy Information Administration, Office of the Oil and Gas Information Service, U.S.D.O.E. Washington DC, February 1980; also, *Coal Data Book*, President's Commission on Coal, Washington DC, February 1980; also, Schmidt, Richard A., *Coal in America; An Encyclopedia of Reserves, Production and Use.* 1979 McGraw-Hill, Inc., West Point PA.

Of the twenty-five States with significant coal reserves, eight have adopted Dormant Mineral Acts and of twenty-four with oil and gas reserves, six have adopted such Acts. The first was enacted in 1893 in Pennsylvania, but eleven of the current fourteen statutes were enacted in the last twenty years. It may be anticipated that the need for such enactments will increase and would have done so even in the absence of the current energy crisis.

> "The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner."

Jurisdictional Statement, *Texaco, Inc., et al.* v. *Short, et al.*, page A-2. Of all the state statutes heretofore adopted, only one—the Minnesota Act—utilizes the concept of escheat or reversion to the state. Minn. Stat. § 93.52-58 (1978); see generally, Outerbridge, *Missing and Unknown Mineral Owners*, 25 Rocky Mountain Mineral Law Institute Proceedings, 20-1 (1979).

The response to the second contention is that the simplest of administrative proceedings can become exceedingly complex, and always involve considerable expense. To put on the landowner the burden and expense of inviting dormant mineral claimants to preserve their interests would defeat the purpose of the Act. The landowner would obviously have no inducement to do so except in those cases where extensive research and investigation might establish in advance that notice would be unlikely to reach the claimant. On the other hand, the State is not equipped for such an undertaking, and, likewise, has no duty to mineral claimants. Thus, we find a grace period concept introduced as a practical, necessary substitute for notice.

Characterization as a fee simple estate does not inhance the nature of a non-productive, severed mineral right, and does not create any constitutional context entitling such a right to protection or preservation, which it would not otherwise have. Nor is "equal dignity" a test of constitu-

tionality in the property sphere. In any event, it is evident that in Indiana such mineral rights prior to the Act enjoyed greater dignity than any other property concept known to man, save only sovereignty itself. See generally, Outerbridge, *Missing and Unknown Mineral Owners,* 25 Rocky Mountain Mineral Law Institute Proceedings, 20-1 at 20-7 (1979).

Often, when a non-productive mineral right is severed in fee, neither party to the transaction knows whether it is worthless, or of some value, or extremely valuable, the odds being greatly in favor of no or little value. This state of facts often remains until some stranger to the transaction at some unknown, unpredictable time expends a great deal of effort and expense to measure, explore, develop and, perhaps, operate the property. Further, the value of the right is extremely volatile. The huge coal deposits of Montana and Wyoming, for example, remained worthless for generations because of transportation costs. Eastern and Midwestern deep coal deposits were heavily produced in the early history of our country and then sold for taxes by the millions of acres in the 1930's and 1940's when oil and gas became cheap and plentiful. Similarly, oil strata capable of stripper production (the type found predominately in Indiana) have been subject to wide swings in value and development.

The severed and fractional interests we here deal with cannot fairly be described as the valuable properties with investor expectations which Pond and Texaco argue so eloquently in favor of. Lacking a record, the landowners submit the following speculations as more nearly comporting with reality in the present cases.

Texaco and other major oil companies by the late 1930's and early 40's learned to find "geologic highs"

through seismic operations in the Illinois basin and elsewhere, and also learned that such highs stood better chances of producing oil and gas than other areas. Times were hard for farmers and a share of their oil rights could be purchased often for a pittance. Farmers knew nothing of geologic highs. Texaco, on the other hand, had no plans to drill or it would have purchased or leased all of the oil rights, not just a fraction. Texaco simply wanted to speculate—to be in on the action if some independent producer made a discovery in the area sometime in the future. To the speculator, the cost was nominal; there was no duty to develop, no property taxes and a fee simple estate forever which could not be lost—a good way for Texaco to use its secret knowledge but hardly a valuable economic contribution worthy of preservation under the guise of a fundamental right.

Pond, on the other hand, reserved her mineral rights when she sold the family farm. At that time, there was only one active deep coal mine in the State of Indiana and stripper oil production, although known in the County, was generally not very profitable to operator or landowner and drilling was on the decline. The value of the mineral estate was extremely speculative—so speculative, in fact, that the farm would bring probably as much on the market without the mineral rights as with them. Again, Pond could reserve and retain the mineral estate indefinitely, at no cost even for taxes, and with no duty to develop—so why not—a natural speculation; but, again, hardly desirable or useful from a public viewpoint.

In short, technical theories of legal estates, tandem titles and investment expectations do not describe the real world in this situation. Reality, in the worst cases, is a hopeless tangle of vague, indefinite and inaccurate quit-

claim mineral deeds interspersed with a generous helping of unsettled estates, estates settled without reference to the mineral deeds, missing persons, missing heirs, defunct corporations and almost no claimant who knows what interest, if any, he owns. At its best, reality is a surface-part mineral owner at odds with the severed mineral owner and developer over the use of surface and surface damage without compensation—in itself a substantial hindrance to mineral development; or a banker unwilling to take a home mortgage from the surface owner.

II. THE ACT SATISFIES ALL REQUIREMENTS OF DUE PROCESS

A. The Act Is Consistent With Substantive Due Process

The mineral claimants, in their briefs, have avoided addressing the issue of substantive due process, but have, instead, attacked the retroactive provision of the Act as procedurally deficient and § 5 (the ten interest exception) as discriminatory.[2] The landowners contend, and the Indiana Supreme Court held (see Texaco's Jurisdictional Statement, page A-10), that the Act should properly be tested as a whole by the standards of substantive due process. The agreed facts in both cases show that the claimants' mineral rights were extinguished solely because claimants failed to make any use of them for twenty (20) years, and, also, failed to file a document with the recorder of deeds within two (2) years after the effective date of the Act. The facts of both cases further show that the §5

[2]Texaco does assert, at page 17 of its brief, under the banner of procedural due process, that it is irrational to require extraction in twenty years of a resource which it took a millennia to create. Appellees perceive no easy response to this chilling argument and elect not to address it.

exception was unavailable to the claimants not only because they owned fewer than ten (10) interests, but also because (1) they made no effort whatever to preserve their unused interests within the two (2) year period; and (2) failure to preserve the interests in question did not result from any claimed inadvertence.[3]

The Act was adopted to facilitate development of Indiana's mineral resources by eliminating interests created during periods of previous development going back to the last century. The owners of such interests frequently depart the area when the boom which prompted the creation of their interests subsides. When an attempt is made to develop such interests today, it is frequently impossible to locate many of the departed mineral owners. In fact, the owners themselves, after a generation or two, become unaware of the existence of the interests. Since title to the minerals is generally not subject to loss by abandonment, a definite need for a legislative remedy exists. (See Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles*, 7 Land and Water Law Review, 73 (1972).

At one time this Court was more inclined to use the due process concept to strike down economic legislation than presently. An example is *Lochner* v. *New York* (1904), 198 U. S. 45, 25 S. Ct. 539. See also Schwartz, *The Constitution of the U.S. Part II The Rights of Property*, 54 (1965), and Corwin, *Constitutional Revolution Ltd.*, 39 (1941). The technique was to examine the evidence and

[3]Appellants might conceivably argue that their inadvertence consisted of ignorance of the requirements of the Act. Such an interpretaion would render §5 meaningless. Further, it should be noted that the record is silent as to whether Appellants lacked knowledge of the Act during the two-year grace period or simply elected to ignore it.

policy considerations motivating the legislature and make anew the legislative decision. This weighing or balancing of the interests approach has been repudiated in more recent cases. The proper test is now stated to be whether the legislation bears any reasonable relationship to any legitimate legislative objection; whether under any state of facts that may be assumed, the legislature would have been justified in acting as it did. This view is reflected in *Nebbia* v. *New York* (1934), 291 U. S. 502, 54 S. Ct. 505, and underscored in *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154, 58 S. Ct. 778, 784, where a statute was upheld against a due process attack. The Court said:

> ". . . But by their very nature such inquiries, where the legislative judgment is drawn in question, must be restricted to the issue whether any state of facts either known or which could reasonably be assumed affords support for it. Here the demurrer challenges the validity of the statute on its face and it is evident from all the considerations presented to Congress, and those of which we may take judicial notice, that the question is at least debatable whether commerce in filled milk should be left unregulated, or in some measure restricted, or wholly prohibited. As that decision was for Congress, neither the finding of a court arrived at by weighing the evidence, nor the verdict of a jury can be substituted for it."

To a similar effect is *Day-Brite Lighting* v. *Missouri* (1952), 342 U. S. 421, 72 S. Ct. 405.

In *Usery* v. *Turner Elkhorn Mining Co.*, 428 U. S. 1, 96 S. Ct. 2882 (1976), the Court held, in ruling upon constitutionality of provisions of the Coal Mine Health and Safety Act of 1969, that due process poses no bar to requiring a coal mine operator to provide compensation for a former miner's death or disability due to illness arising out

of employment in its mine even if the former miner terminated his employment in the industry before the Act was passed, and that Congress did not act arbitrarily in selecting ten and fifteen year figures as reference points for presumptions of disability. In that case, the argument was very strongly made that the burdens of compensation would be unfairly distributed among present mine operators, particularly those who employ far fewer miners presently than previously. The Court acknowledged the validity of these arguments, but with respect to the constitutionality of the Act, said:

> "[3] It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." (428 U. S. at page 14)

and further said with respect to the legislative choice of remedy:

> "We are unwilling to assess the wisdom of Congress' chosen scheme by examining the degree to which the 'cost-savings' enjoyed by operators in the pre-enactment period produced 'excess' profits, or the degree to which the retrospective liability imposed on the early operators can now be passed on to the consumer. It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." (428 U. S. at page 18)

The *Usery* case was cited and relied upon in *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U. S. 59,

98 S. Ct. 2620 (1977). In that case, the Court found no constitutional bar to a Federal act imposing a $560,000,000 limitation on liability for nuclear accidents resulting from the operation of Federally licensed private nuclear power plants.

The statute in this case is designed to facilitate the development of Indiana's natural resources—both surface and subsurface. To that end, it requires the owners of dormant mineral interests to file a doucment every twenty (20) years in order to preserve their interest. As the Indiana Supreme Court said in its opinion in this case:

> "By declaring the mineral interest terminable under the conditions set forth in the other sections of the Act, the legislature sought to create an environment in which mineral interests will be promptly exploited or abandoned. If achieved, this objective would create economic benefits for the people and industries within local communities where actual development activities result and would create other land development where abandonment results. The criteria in Ind. Code § 32-5-11-5, can be rationally conceived as establishing a border line beyond which strict application of the Act's extinguishment standards would become destructive of these goals."

Texaco, Inc., et al. v. *Short, et al.*, Jurisdictional Statement, page A-11. Under the foregoing authorities, the State is permitted to act in the public interest even though the effect may be to interfere with the liberty or property of individuals and even though other schemes might have been wiser or more practical.

B. There Was No "Taking" of the Mineral Claimants' Property Within the Meaning of the Fourteenth Amendment

The statute involved in this case is clearly not a taking for which compensation must be paid, because it is not a taking for public purposes. See Sax, *Taking Private Property and Public Rights*, 81 Yale L.J. 149 (1971); Sax, *Taking; The Notice Power*, 74 Yale L.J. 36 (1964); and *Penn Central Trans. Co.* v. *New York City*, 438 U. S. 104, 135, 98 S. Ct. 2646 (1977).

In *Penn Central*, this Court explored the question as to what kind of governmental action will constitute a "taking" and concluded that:

> ". . . this court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government . . .
>
> "Government herdly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. *Pennsylvania Coal Co.* v. *Mahon* . . ."

Pennsylvania Coal Co. v. *Mahon*, 260 U. S. 397 (1922), is cited by the Court in *Penn. Central Trans. Co.* v. *New York City* as the leading case for the proposition that:

> "a state statute . . . may so frustrate distinct investment—backed expectations as to amount to a taking."

In the *Pennsylvania Coal Co.* case, the statute prohibited the coal company from mining coal in such a manner as to withdraw surface support. That right had been acquired by purchase from the complaining landowner. Rights purchased by the coal company were thus lost by the coal

company immediately and irretrievably upon the statute taking effect. There was nothing the coal company could do to avoid the loss. In the instant case, of course, the statute does not operate at all if the appellant mineral claimants make some use of their property or file a document of record every twenty years. Furthermore, if "investment-backed expectations" are the key consideration, then the fact that the statute in the instant case only operates on speculative interests which have been dormant for a period of twenty years, would seem to clearly take it beyond the scope of *Pennsylvania Coal Co.* v. *Mahon.* See *Goldblatt* v. *Town of Hempstead* (1922), 369 U. S. 393, where the Court found no taking under a Town Ordinance which effectively extinguished certain mineral rights by prohibiting excavation under a water line.

The statute in the instant case regulates the relationship between owners of interests in a given tract of land and as such a regulation it is only necessary that it bear a reasonable relationship to a proper legislative objective. That it does bear such a relationship is demonstrated by those cases which have dealt with similar legislative attempts to keep land titles current and marketable, discussed in the sections of this brief that follow.

C. Similar State Legislation Has Been Upheld Against Constitutional Attack

While the constitutionality of this statute must be determined on the basis of principles and rules laid down by this Court, it is material to the inquiry to note the manner in which similar statutes and closely related legislation operate on land and have been treated by the state courts. This is particularly true since this Court has not frequently dealt with the kind of legislation here involved and a large

body of law has been developed by state courts dealing with these questions.

The general statutes of limitation with respect to the bringing of an action to recover possession of real estate have an effect upon real estate almost identical to that of the instant case, and they operate in much the same manner. See, e.g., Ind. Code 34-1-2-2. In both cases, title to real estate is lost because of failure to assert one's right thereto within a period prescribed by the statute. The action required by the statute of limitation is the filing of a lawsuit. The action required by the Dormant Mineral Act is the filing of a document with the recorder of deeds. In both instances, the interest can also be preserved by actual possession or use of the property. In operation and effect then the Dormant Mineral Act and the doctrine of adverse possession (as codified in statutes of limitation) are identical. If it be argued that the statute of limitation can be distinguished because there the owner is given notice of the peril to his property by the possession of the adverse claimant, which the law requires to be open and notorious for that very reason, then the answer is that the law itself, in the instant case, gives notice to the mineral owner that his property is in peril, and that he must act to preserve it.[4]

The mineral claimant in *Pond* further contends that statutes of limitation are not analogous because (1) they are devices to protect the integrity of the judicial process by excising stale claims; and (2) their impact is procedural rather than substantive. *Pond* also argues that

[4]It is noteworthy that statutes of limitation in general have no conditions or requirements equivalent to adverse possession; i.e., the person in whose favor the statute is running has no duty to notify his prospective opponent that he intends to rely upon the statute of limitation as a defense if suit is filed.

the Act encourages litigation of factual issues presently difficult to prove. The latter argument surely is not seriously advanced. In Indiana, mineral development of all kinds for more than fifty years has been subject to detailed regulation, control and historical record making.[5] Proof of payment of taxes, or of use or non-use of mineral rights for twenty years immediately preceding a given date, would surely require only minimal effort and expertise in evidentiary matters. With regard to the former, the landowners submit that ultimately all wealth springs from the land and its integrity is as important as that of the judicial system.

The distinction between substance and procedure was argued by the mineral claimants in the Courts below on the theory that a statute of limitation bars the remedy, leaving the right intact. Whatever may be the law in other areas, it was long ago settled that with respect to property the running of the limitation period results in a transfer of title. See opinion of Holmes, J. in *Chapin* v. *Freeland* (1886), 142 Mass. 383, 8 N. E. 128. This Court has also recognized that the distinction between barring the remedy and extinguishing the right is no longer valid. *El Paso* v. *Simmons* (1964), 379 U. S. 497, 85 S. Ct. 577. To the same effect is *State* v. *La. Oil Ref. Corp.*, 176 So. 686 (La. App. 1937), where it is said:

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[5]See, e.g., Ind. Code Chapters 13-4-7; 13-4-1; 22-1-1 and 22-10-1. Texaco advances a similar argument at page 13 of its brief, stating that oil and gas operators will not be able to rely on the record. Experienced title examiners know that titles to mineral lands are frequently cluttered with unreleased leases and term interests expiring when production ceases, even though no development has ever actually occurred on the land. The Dormant Mineral Act introduces no new risks of this nature but does provide a means, however clumsy, of eliminating at least some of these risks.

> "Real and personal property may be acquired by prescription as against the true owner, yet no one contends that laws recognizing this method of acquisition deprive the owner of his property without due process of law or deny him equal protection of the laws."

The marketable title statutes, patterned on the MODEL MARKETABLE TITLE ACT, adopted in several States, also have an operation and purpose similar to the statute involved in this case. Their purpose is to clear titles of stale claims and they operate to extinguish property interests which are based upon transactions of record predating the root of title of the person in whose favor the statute operates. The root of title of such person must, in order to extinguish prior claims, have been of record for a minimum period which varies from twenty years (see North Dakota CC. 47-19A-01) to the fifty-year period of the Indiana Statute, I.C. 32-1-5-1, and it must not be expressly subject to the prior claim. The claim being extinguished may be a future interest or a present interest and it may be a possessory interest. In fact, the true fee simple ownership of one in possession may be extinguished because the statute operates in favor of one whose *record* root of title goes back fifty years without regard to whether such person is in possession. Furthermore, many of the marketable title statutes will operate to cut off mineral interests such as the ones involved in this case. The Indiana Act, which is the model Act, would, in fact, appear to do so. Simes and Taylor, *Improvement of Conveyancing by Legislation*, at 240 (1960).

The mineral claimants' contention that the marketable title acts "decide between competing claims to the same property", while the Dormant Mineral Act "creates conflicting claims between surface owners and the severed

mineral interest owners which would not otherwise arise", demonstrates a lack of understanding of both the model act and the statute involved in this case because there is simply no such distinction to be made. Both the Model Marketable Title Act and the Dormant Mineral Act operate to terminate interests in real estate which have been carved out of the residual fee, including mineral interests. Both terminate interests which, except for the act, would have continued to be valid, subsisting interests, and, therefore, both acts "create the conflicting claims."[6]

Marketable title acts such as the one adopted in Indiana have been held to be constitutional. In Bayse, *Clearing Land Titles,* 384 (1970), it is said:

> "The constitutionality of the Marketable Title Acts have been questioned on three grounds: (1) that they are retroactive in character; (2) that their operation deprives persons of their property without due process of law; and (3) that they impair contract rights. They have been upheld on each count."

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[6]Thus, for example, if the fee simple interest in a tract of Indiana land was fragmented in 1920, whether it be by creation of a life estate and remainder, or by severance of the minerals from the residual fee, and if the next conveyance relating to the land is in 1925 and is by the life tenant or the surface owner, as the case may be, and that conveyance simply describes the land and is not expressly made subject to the outstanding title fragment (i.e., the remainder or the mineral interest), the 1926 conveyance becomes a root of title which in 1975 will operate to extinguish the title fragment. The Act will not operate, of course, if the fragment itself is the subject of a recorded conveyance between 1925 and 1975, but if it is not, and if none of the other exceptions in the Act are applicable, the title fragment will be extinguished. This is true even if the title fragment was itself of record and the conveyance in 1925 was, therefore, as a matter of law, subject to it. It is, therefore, apparent, as has been said, that the Marketable Title Act itself

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The Minnesota Marketable Title Act was upheld in *Wichelman* v. *Messner,* 250 Minn. 88, 83 N. W. 2d 800, 71 A.L.R. 2d 8.6 (1957); the Iowa statute was sustained in *Tesdell* v. *Hanes,* 248 Iowa 742, 82 N. W. 2d 119 (1957); the Florida statute was upheld in *City of Miami* v. *St. Joe Paper Co.,* 347 S. W. 2d 622 (1977). See also Simes and Taylor, *Improvement of Conveyancing by Legislation,* 253 (1960); Aigler, *A Supplement to "Constitutionality of Marketable Title Acts,"* 1951-1957, 56 Mich. L. Rev. 225 (1957).

Another fairly common title curative statute operating to extinguish otherwise valid and subsisting interests in land is that which terminates future interests which follow defeasible fee interests. Such statutes typically provide that such future interests cannot endure for more than a stated period of time (see, e.g., Ill. Rev. Stat., 1953, Ch. 30, §§ 37e and 37f), and are typically made applicable to existing interests. The Illinois statute has been held to be constitutional, *Trustees of Schools of Township No. 1* v. *Batdorf,* 6 Ill. 2d 486, 130 N. E. 2d 111 (1955). Similar statutes have been held to be valid in Iowa *(Presbytery of Southeast Iowa* v. *Harris,* 226 N. W. 2d 232 (1975); Nebraska *(Hiddleston* v. *Nebraska Jewish Education So-*

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"creates the conflict" between the title reflected in the root of title and the title fragment, and the Marketable Title Act operates to terminate the one in favor of the other. The Marketable Title Act operates because of inactivity *of record* with respect to the title fragment. If one adds to the hypothetical the fact that the severed mineral owner failed to produce minerals subsequent to 1955, and did not file a statement of claim of record, as provided for in the Dormant Mineral Act, the Dormant Mineral Act will also operate to terminate the interest in 1975. Thus, both the Marketable Title Act and the Dormant Mineral Act would have operated to terminate an otherwise valid interest; the one because of inactivity of record and the other because of inactivity on the land itself.

ciety, 186 Neb. 786, 186 N. W. 2d 904 (1971); Kentucky *(Cline* v. *Johnson County Board of Education,* 548 S. W. 2d 507 (1977) and Massachusetts *(Town of Brookline* v. *Carey,* 355 Mass. 424, 245 F. Supp. 1076 (D. Mass. 1968)).

Another long established statutory scheme which operates in a manner almost identical to the act involved in this case is the Louisiana liberative prescription doctrine. In that State, it is held that a code provision which causes easements to terminate after ten years of non-use is applicable to severed mineral interests. Article 789, Louisiana Code (West's La. Civ. Anno. 1973).

Since Louisiana classifies mineral interests as incorporeal, and, therefore, servitudes within the meaning of the code provision, the Louisiana Courts very early applied the code provision to severed mineral interests. *Frost-Johnson Lbr. Co.* v. *Sallings Heirs,* 150 La. 756, 91 So. 207 (1920). The effect is that non-production of the minerals for a period of ten years on a tract on which the ownership of the minerals has been severed from the surface will cause the severed mineral interest to terminate. In other words, when the servitude is not being used a prescriptive period is running in favor of the owner of the burdened land and a continuation of that non-use for ten (10) years will liberate the servient estate from the burden of the servitude. Thus, the doctrine is called "liberative prescription." (See Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines,* 25 Tulane Law Review 30 (1950).)

In a manner similar to Louisiana, Indiana classifies severed mineral interests as incorporeal. *Monon Coal Co.* v. *Riggs,* 115 Ind. App. 236 (1944); *Halbert* v. *Hendrix,* 121 Ind. App. 43 (1950). Under fact similar to this case, some Courts have held such interests to be extinguished by abandonment. 1 Williams and Meyers, *Oil and Gas Law,* 108.

In *Gerhard* v. *Stephens*, 68 Cal. 2d 864, 69 Cal. Reptr. 612, 442 P. 2d 692, 31 O. & G. R. 28 (1968), the Court held that severed mineral interests may be lost by abandonment and that proof of abandonment may consist of evidence of nonuse together with evidence of circumstances concerning "economic exigencies and external realities." The use of the quoted phrase was simply a device whereby the Court was able to apply the abandonment doctrine without any direct evidence of intent to abandon. It is, therefore, clear that the California Courts and Louisiana were doing, judicially, precisely what the Indiana legislature has attempted to do by statute. It is also clear that the reasons for the California decision were the same as those which motivated the Indiana legislature. The Court said:

> "If interests in real property can be and are abandoned, they do not become, as in the case of personal property, the property of the first appropriator . . . but instead return to the estate out of which they were carved. . . . [A] perpetual right to remove oil and gas would ordinarily revert to the surface estate, thereby freeing that estate of its burden and permitting its owner more complete utilization and enjoyment of his property.
>
> . . .
>
> "Commentators have noted that 'The abandonment concept, when applied, frequently serves the very useful purpose of clearing title to land of mineral interests of long standing, the existence of which may impede the exploration or development of the premises by reason of difficulty of obtaining the joinder of such owners.'"

No one would, of course, question the power of the California Court to meet this problem by adopting a rule that severed mineral interests can be lost by abandon-

ment nor that Court's power to fix the standards for determining when an abandonment has occurred. If that is true, then the Indiana legislature should have at least as much power to meet the same problem in almost precisely the same manner.[7]

D. The Retroactive Features of the Act Satisfy the Requirements of Due Process

As lawyers are wont to do, the mineral claimants in this case pursue their objective over many paths simultaneously. Ultimately, all paths lead to the same question: On what terms can the State make the Act applicable to interests created prior to its effective date? The landowners submit that such power does exist, provided only that the owner of the interest must be given a reasonable opportunity after passage of the Act to preserve it.

Statutes of limitation have been held to operate so as to terminate rights in existence at the time the statute was adoped and of unlimited duration when created. A very early Indiana case involved just such facts. In *Prichard* v. *Spencer,* 2 Ind. 486 (1851), it was held that a six-year statute of limitation which became effective in March of 1844 applied to bar an action commenced in June of 1848 on facts arising prior to June of 1842, at which time no statute of limitation applied to the transaction. The Court said:

> "It is a well-settled principle of law that courts are to give statutes a prospective operation where there is nothing indicating a different intention on the part of the legislature which enacted the statutes. It is an

[7]Although its constitutionality has apparently not been tested, it is interesting to note that Congress has its own version of the Dormant Mineral Act pertaining to Federal lands. 43 U.S.C.A. §1744. This Act provides a grace period of three (3) years after its effective date for filing instruments of claim.

equally well-settled principle that the legislature may enact retrospective limitation laws where they do not deprive parties of a reasonable time for prosecuting their claims before being barred."

In *Mahood* v. *Bessemer Properties, Inc.*, 18 So. 2d 775, 153 A.L.R. 1199 (Fla. 1944), the Court said:

"A statute providing that within a reasonable time after its passage existing contracts shall be filed or recorded is constitutional. See *Henry* v. *Myers*, 76 Kan. 723, 93 P. 2d 168, 173, 17 L.R.A. (N.S.) 779. A statute imposing additional duties on the owner of a contract so that the same may be preserved is not void nor is a statute which allows a *reasonable time or notice* prior to steps for enforcement. See *State ex rel. Nat. Bond & Security Co.* v. *Krahmer*, (N.S.) 157." [emphasis supplied]

In *Wichelman* v. *Messner*, (see footnote 8), 250 Minn. 88, 83 N. W. 2d 800, 71 A.L.R. 2d 816 (1957), it is said:

"The constitutional prohibitions against retrospective legislation do not apply to statutes of limitation, 'for such a statute will bar any right, however high the source from which it may be deduced, provided that a reasonable time is given a party to enforce his right'.

. . .

"What may be a reasonable time depends upon the sound discretion of the legislature in light of the nature of the subject and purposes of the enactment and we have said that 'the courts will not enquire into the wisdom of the exercise of this discretion by the legislature . . . *unless the time allowed is manfestly so short as to amount to a practical denial of justice.* [emphasis supplied]. *Hill* v. *Townley*, 45 Minn. 167, 169, 47 N. W. 653, 654; Note, 33 Minn. L. Rev. 54."

To the same effect are *Opinion of the Justices*, 338 N. E. 2d 806 (Mass. 1975); *Allen* v. *Dowell*, 66 A. 2d 795 (Md. 1949);

Kazisck v. *Brighton*, 210 N. W. 622, 49 A.L.R. 1260 (Minn. 1926).[8]

The Louisiana doctrine of liberative prescription also owes some of its origin to the Louisiana Courts. While it is based upon provisions of the civil code relating to incorporeal interests, it was not always clear that those provisions would be applied to mineral interests. See Nabors, *The Louisiana Mineral Servitude and Royalty Doctrines*, 25 Tulane L. Rev. 30 (1950). The first cases to apply it to mineral interests did so, however, with no thought being given to the proposition that such retroactivity might be constitutionally objectionable. See *Frost-Johnson Lumber Company* v. *Sallings Heirs*, 150 La. 756, 91 So. 207 (1920). Subsequent statutory modifications of the liberative prescription doctrine have been applied retroactively and they have been sustained against constitutional attacks similar to those involved in this case. In *Miri* v. *Hawkins*, 177 So. 2d 795 (La. 1965), the Court said:

> "With respect to the retroactive application of the 1950 enactment, statutes repealing a former cause for the suspension of prescription may be given retroactive application, if so intended; at least so long as a reasonable time is provided for the assertion of any rights adversely affected thereby."

See also *Cooper* v. *Lykes*, 40 So. 2d 3 (La. 1950).

The statutes placing limits upon the duration of the future interests which follow defeasible fees have also been held to be constitutionally permissible even though they

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[8]The A.L.R. annotation which follows this case deals with grace periods which appear in a variety of statutes and which have been held to be reasonable. That annotation is supplemented in 120 A.L.R. 758.

applied to existing interests. All of the cases heretofore cited in regard to such statutes involved the retroactivity issue. The holdings of those cases are summarized in *Presbytery of Southeast Iowa* v. *Harris*, 226 N. W. 2d 232, 240 (1975), where the Court said:

> "Defendants assertion to the effect § 614.24 denied them due process of law because it retroactively eliminated vested rights before the right of enforcement arises simply fails under any applicable test. The public interest served by § 614.24 is self-evident. Its cognate enactment, Code § 614.17, in effect for over forty years, serves to bar interests which have not been protected by timely filing of the required claim."

It is the very nature of marketable title legislation, of course, that it be given retroactive effect and all the decisions sustaining such legislation have involved the constitutionality of the retroactive provisions.[9]

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[9]The leading case on the subject seems to be *Wichelman* v. *Messner*, 250 Minn. 88, 83 N. W. 2d 800, 71 A.L.R. 2d 816 (1957). In a lengthy and well written opinion the Minnesota Supreme Court dealt with and disposed of just about every constitutional question raised in this case. Among other things, the Court said:

". . . The recordation provisions of the Act provide for a simple and easy method by which the owner of an existing old interest may preserve it. If he fails to take the step in filing the notice as provided, he has only himself to blame if his interest is extinguished. 'The constitutionality of imposing this duty would seem to have been settled beyond question by the decisions sustaining retroactive recording statutes.' Scurlock, *Retroactive Legislation Affecting Interests in Land*, Michigan Legal Studies, p. 82; . . .

"It is recognized that an amendment to a recording statute which shortens or limits the time during which a recorded instrument shall be effective and provides for renewal of such instrument by re-recording or refiling is constitutional as to existing recorded instruments where a reasonable time is al-

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The mineral claimants do not argue that the grace period in this case was too short. They contend that the retroactive features of the Act must be tested by the procedural due process standards contained in *Mullane* v. *Central Hanover Bank and Trust Co.* (1950), 339 U. S. 306, 70 S. Ct. 652, 494 L. Ed. 865, *Bell* v. *Burson* (1971), 402 U. S. 535, 91 S. Ct. 1586 and *Fuentes* v. *Shevin* (1972), 407 U. S. 67, 92 S. Ct. 1883. This argument suggests that although the statute represents a proper means of accomplishing a legitimate legislative objective, it cannot constitutionally do so unless it incorporates an administrative proceeding whereby the affected parties are given notice of the potential application of the statute to them and an opportunity after such notice, not only to avoid the consequences by filing, but also to disprove the facts upon which the application of the statute is to depend. The statute, it is argued, could not be effective, in any particular case until after the hearing. It is constitutionally impermissible, in other words, to enact a statute which is self-executing; one which fixes the rights of parties upon the concurrence of certain facts prior to, or in the absence of, an administrative hearing.[10]

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lowed for compliance with the statute. . . . In *Jackson ex. dem. Hart* v. *Lamphire*, 3 Pet. 280, 190, 28 U. S. 290, 7 L. Ed. 679, 683, the Supreme Court of the United States said that whether the statute be 'considered as an act of limitations or as a law sui generis' it is immune to constitutional objections.

[10]Thus, the appellants in *Pond* v. *Walden* say, on page 16 of their brief (in relation to the Indiana Act);

"It similarly provides no opportunity for them to appear in any forum, administrative or judicial, to declare their interest in the property or to show that they would have met the statute

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A similar notion was the basis for the decision in *Chicago and Northwestern Trans. Co.* v. *Pederson* (1970), 80 Wis. 2d 566, 259 N. W. 2d 316, cited by both appellants. In that case, the Wisconsin Court struck down a statute similar to the one involved here. In doing so, the Court said:

> "In this case, the plaintiffs' mineral rights will revert to the surface owner if they are not registered or taxes paid on them. *At least the plaintiffs must have a hearing where they can question the determination of the registrar of deeds that the registration has not been done and that the taxes have not been paid.*" [emphasis supplied]

This contention is contrary to several centuries of Anglo-American legal tradition. The self-executing statute providing for the accrual or transfer of rights upon the occurrence of stated facts has been the rule rather than the exception in our legal system. It has always been true, of course, that if there is any dispute as to the existence of the facts upon which the operation of the statute depends, resort may be had to judicial proceedings and in such judicial proceedings, the due process requirements of notice and hearing must be accorded. See

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requirements had they known of them. It does not even give them an opportunity to show that they did, in fact, meet the requirements of the act."

Similarly, the appellants in *Texaco* v. *Short* say, at page 23 of their brief:

> "The effect of the act is to take the mineral owner's property because he did not use it for twenty years and did not re-record his interest within the twenty-year period. No notice was given of the lack of re-recording before the forfeiture occurred. At the very least, such notice should be required before application of the draconion remedy of extinguishment."

Londoner v. *Denner*, 210 U. S. 373 (1908) and *Bi-Metalic Investment Co.* v. *Colorado*, 239 U. S. 441 (1915). Once such a hearing is held, however, and it is determined that the necessary facts exist, the statute will be held to have been applicable as of the time the facts occurred. It has never been true in our legal system that the law only becomes applicable upon the completion of judicial proceedings. It may be true that in recent years many laws have been adopted which provide for administrative enforcement, and it may also be true that the administrative process may include an assumption that the law will not affect the rights of the parties until completion of the administrative process. It does not follow, however, that the administrative process has completely displaced the self-executing statute and no court in the United States, other than the Wisconsin and Illinois Supreme Courts and the trial court in this case, has ever so held.

None of the decisions of this Court cited by appellants lend support to this argument. In none of the cited cases does this Court hold anything more than that when the enforcement machinery of the legal system is brought to bear upon a particular situation, there must be an opportunity for the affected parties to be heard. This is true whether the action of the state is for the purpose of making a binding adjudication concerning the application of the law to the facts, or whether it takes the form of action by an official of the state in opposition to the rights of an individual. In all of these cases, the enforcement machinery, the power of the state, is being utilized to make general laws applicable to the individuals involved in a particular transaction.

Thus, in *Mullane* v. *Central Hanover Bank and Trust Co., supra*, a trustee's report was to be made binding by

adjudication upon the beneficiaries, and the Court held that such a result must be preceded by notice. In *Bell* v. *Burson, supra,* an individual's drivers license was being revoked and the Court held that unless a hearing preceded the deprivation it was a violation of the constitution. The same is true of *Fuentes* v. *Shevin, supra,* and *Sniadach* v. *Family Finance Corp. of Bayview,* 395 U. S. 337 (1969). In both of those cases, the power of the State was brought to bear upon one of the parties to a dispute prior to a hearing. In both cases, this Court held that the action was inconsistent with the due process clause because it was not preceded by notice of hearing. In none of these cases, however, is it held that the self-executing statute is constitutionally improper.

It is, therefore, apparent that if the notice the mineral claimants claim they were denied was the kind of notice which our system requires prior to the enforcement machinery of the State being used to make general laws applicable to particular situation, then they received that notice when the suit was filed in the instant case wherein it was contended that their interests had terminated under the provisions of the Indiana Mineral Lapse Statute. On the other hand, the mineral claimants seem to confuse the notice involved in judicial proceedings with the notice, or lack of it, which one has of the application of general rules to one's particular situation. Thus, they argue that a legislature cannot adopt a general rule which will affect individuals without giving notice to all individuals who might be affected. On page 23 of Appellants' brief in *Texaco* v. *Short,* it is contended:

> "Suffice it to say that if this Court would not approve the notice by publication in a newspaper in Mullane, supra, because it was 'not reasonably calculated to

> reach those who could easily be informed by other means at hand' such notice of the adoption of the act would not satisfy the due process requirement."

Everyone is presumed to have notice of the law. Any system which required the lawmaker to give personal notice to everyone who might be affected by the law would be unworkable.

In dealing with this issue in the cases at bar, the Indiana Supreme Court cited, among other cases, *Turner* v. *People of State of New York* (1897), 168 U. S. 90, 18 S. Ct. 38, 42 L. Ed. 392, and *Wilson* v. *Iseminger* (1902), 185 U. S. 55, 22 S. Ct. 573, 46 L. Ed. 804. The statutes in both of these cases deal severely with rights in real property and do so on the basis of provision for a grace period rather than administrative or judicial notice to the affected persons. In *Turner*, it was held that a State statute declaring that past sales and conveyances by a comptroller for non-payment of taxes would be conclusively presumed regular six months after the effective date of the act. The six months time period was held to provide a reasonable time for bringing an action. In *Wilson*, this Court upheld a statute which barred actions to recover ground rents and extinguished totally the right to recover further such rents after twenty-one years had expired during which no declaration or acknowledgement of the existence of the right or claim had been made. The statute provided that the bar and extinguishment would not be effective until three years after passage of the act. The Court held that the act gave a reasonable time to the owners of ground rents for preserving their rights. With regard to the *Wilson* case, the Indiana Supreme Court stated (Texaco, Inc., Jurisdictional Statement, page 89):

> "This case strongly supports the validity of our Act, because it upheld a statute having an extinguishment feature similar to the Indiana Act under consideration."

The Indiana Supreme Court also cited *Hawkins* v. *Barney's Lessee* (1831), 5 Pet. 457, 8 L. Ed. 190, and *Terry* v. *Anderson* (1877), 95 U. S. 628, 24 L. Ed. 365, both of which cases upheld acts of limitation. With regard to these cases, the Indiana Court noted:

> "The transfer of right upheld by the court was deemed the indirect product of the limitation law. The transfer of right effected by the Indiana Act under consideration is its direct product. That minor difference would not support a contrary evaluation of our Act."

Texaco, Inc., Jurisdictional Statement, page A-8.

In *Texaco,* the mineral claimant argues that the Act does not satisfy the due process factors identified in *Mathews* v. *Eldridge,* 424 U. S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). The factors may be entirely appropriate, but Texaco has misconceived the facts applicable thereto. In this case, there is no private interest affected by official action because the Act provides for no official action. The risk of "erroneous deprivation" is reduced by a time honored substitute procedural safeguard which is the two-year grace period, and the State's interest in minimizing fiscal and administrative burdens is substantial in relation to the value of the interests involved since there is no practical way for the State to provide actual notice to a limited number of affected citizens of the provisions of its laws. Indeed, Texaco, as indicated above, actually argues that the law cannot be effective because the manner of its publication does not satisfy the notice requirements of *Mullane.*

This argument applies with equal force to every statute the Indiana General Assembly has ever enacted which in any way affects or limits property rights.

E. Most of the Cases Involving Other Dormant Mineral Acts Have Upheld Them

Any decision concerning the constitutionality of the statute involved in this case must rely heavily upon precedents from analogous situations such as those discussed above. This is true because statutes of this kind are of relatively recent origin. (See Street, *Need for Legislation to eliminate Dormant Royalty Interests*, 42 Mich. St. B. J. 49 (March 1963). Several states have, however, in recent years, adopted statutes similar to the Indiana Act[11] (See 1 Williams and Meyers, *Oil and Gas Law*, § 216.47) and there have been some cases decided concerning the constitutionality of those acts. These statutes utilize a variety of approaches. The Nebraska and Illinois statutes proceed on the assumption that non-use for a period of years results in abandonment. Section 57-229 of the Nebraska statute, for example, provides:

> "a severed mineral interest shall be abandoned unless the record owner of such mineral interest has within twenty-three years immediately prior to the filing of

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[11]Similar statutes have been adopted in Illinois (Smith-Hurd Illinois Annotated Statutes, §§ 30:197-198); Michigan (Michigan Statutes Annotated §§ 26.1163(1)-26.1163(4)); Nebraska (Stat. Nebraska 1943, § 57-228 to 57-231); Florida (F.S.A. § 704.05 (enacted in 1970) but subsequently amended in Laws of Fla. 73-140 (1973) and 75-94 (1975)—see 1 Williams and Meyers, *Oil and Gas Law*, § 216.74); Georgia (Ga. Code § 85-407.1); Virigina (Va. Code §§ 55-154 and 55-155); Tennessee (Tenn. Code, Ann. § 64-704); Wisconsin (Wis. Stat. Ann. 700.30); and South Dakota (S.D. Codified Laws Anno. § 43-30-8.1 (Supp. 1979).

> the action provided for . . . exercised publicity the right of ownership."

The Virginia statute proceeds upon the theory that nonuse for a period of thirty-five years creates a prima facie case that there are no minerals under the land. The Act provides for institution of a suit by the surface owner. If the mineral owner does not proceed to discover minerals under the land within six months after institution of the suit, the Court "shall enter a decree declaring the claim or right to be a cloud on the title and releasing the land therefrom and extinguishing the same." (Section 55-155 of the Va. statute).

The Georgia statute expressly utilizes a theory of adverse possession similar to the Louisiana liberative prescription doctrine. Ga. Code § 85-407.1.

The Virginia statute was challenged in *Love* v. *Lynchburg Nat. Bank & Trust Co.*, 205 Va. 860, 140 S. E. 2d 650, in which a severed mineral owner claimed the statute deprived him of property without due process. The Virginia Court sustained the validity of the statute stating at page 653 in the Southeastern Reporter:

> "No legislative act may be declared unconstitutional except where it is clearly and plainly so. The legislature has a right to enact particular rules of evidence, to establish rights and to justify the extinguishment of rights."

The Georgia statute was involved in litigation shortly after its adoption. The case was *Nelson* v. *Bloodworth*, (1977), 232 S. W. 2d 547, a suit by a landowner to have his ownership declared to be free of a severed mineral interest. The Court held that the statute was meant to apply only prospectively, and no question was raised by the Court

as to the constitutionality of the Act as so applied. The limitation to prospective application, however, only meant that the period required to cut off an interest under the statute must all follow the effective date of the statute. It was quite clearly held that the statute applied to existing interests and that such interests would terminate upon the lapse of the specified period after the effective date of the Act. Such a holding seems justified in view of the fact that the Georgia statute declared that, upon its effective date, possession of the surface estate carried with it possession of the mineral estate, contrary to the holding of previous Georgia cases. It, therefore, seems logical that the seven years possession required by the Act would have to accrue subsequent to the passage of the Act. This is particularly true since the Act contained nothing to indicate a contrary intent such as a grace period for those cases in which the statutory period might have run prior to the effective date of the Act. Thus, the Indiana Act has precisely the same effect as was held to be constitutional in the Georgia case. It provides for the termination of existing interests upon the lapse of a specified period following the effective date of the Act.

A Florida statute, similar in many respects to the Indiana Act under consideration, was tested in *Trustees of Tufts College* v. *Triple R. Ranch, Inc.*, (Fla. 1977), 275 So. 2d 521, and the conclusions reached by the Court in that case are entirely consistent with the contentions of the landowners in this case. The statute involved there differed from the Indiana Act in that it did not provide for a period after the effective date of the Act in which the owner of a mineral interest could act to preserve his interest and did not provide for re-filing. The statute provided:

704.05 Easements and rights of entry.—

(1) The rights of entry, or of an easement, given or reserved in any conveyance or devise of realty, when given or reserved for the purpose of mining, drilling, exploring, or developing, *shall* be limited to a twenty (20) year period beginning with the recording of such conveyance or devise if such rights are not exercised during this twenty (20) year period.

(2) After the twenty (20) year period has expired, the owner of such property *may* file a suit in the circuit court of the county in which the property is located, and upon such procedure as used in quieting title the court shall, upon proof of the nonexercise of such rights and the expiration of the twenty (20) year limitation, enter a decree forever clearing and confirming the removal of said rights from the title to the said real estate. [emphasis supplied]

The Florida Supreme Court held that the statute should be applied only prospectively to interests created after the effective date of the Act. The reason for doing so was the absence in the statute, of a grace period wherein those whose interests had been unused for the twenty years prior to the effective date of the Act, could preserve them. *Ibid,* at page 528.

The Supreme Court of Michigan recently held a similar Michigan statute to be constitutional after a split between decisions of the Appellate Courts of that State on the question. *Van Slooten* v. *Larsen,* 299 N. W. 2d 704, (Mich. 1980). In doing this, the Court said (at page 706):

> "The Dormant Mineral Act was a thoughtful response by the legislature to a perceived problem based on the experience and history of the developing oil and gas industry in this State, and on the experience of other oil and gas producing States."

In addition to the decisions in Virginia, Georgia, Florida, Michigan and Indiana, which are direct authority regarding the constitutionality of the Indiana statute, there are also, as already pointed out, cases upholding the application of the Louisiana code which operates even more severely upon severed mineral interests than does the Indiana statute, and there is the California decision which utilizes an abandonment doctrine to reach the same result, in almost identical situations, as the Indiana Statute. Opposed to this rather substantial body of authority are four cases. They are *C. & N.W. Transportation Co.* v. *Peterson* (1980), 80 Wis. 2d 566, 259 N. W. 2d 316; *Wheelock* v. *Heath,* 201 Neb. 835, 272 N. W. 2d 768 (1978); *Wilson* v. *Bishop,* (1980) 82 Ill. 2d 364, 412 N. E. 2d 522; and *Contos* v. *Herbst,* 278 N. W. 2d 732 (Minn. 1979). The Wisconsin case seems to be based primarily upon procedural due process objections. The unsoundness of that approach is discussed above in this brief. The Illinois Court in *Wilson* v. *Bishop* relied heavily upon the Wisconsin decision and generally used the same reasoning. *Wheelock* v. *Heath* relied upon, and, in fact, cited little or no authority other than the decision of one of the Michigan intermediate Appellate Courts, which decision was later set aside by the Michigan Supreme Court in *Van Slooten* v. *Larsen, supra.* The Minnesota case dealt with a statute that was considerably different in its operation and effect than the other statutes under consideration. That act provided for forfeiture of the severed mineral interest to the State upon failure to file a document by the owner of the interest. The State was only required to give notice of the filing requirement by publication. The Court held that the notice provision did not comply with due process requirements. The Minnesota decision, therefore, is nothing

more than a decision that in condemnation cases the notice must be adequate to inform the condemnee of the action. It has little to do with the issues in this case.

F. The Statute Does Not Deny Equal Protection of the Laws

The mineral claimants contend that the statute in question also violates the equal protection clause of the Fourteenth Amendment because of the exception to the filing requirement contained in I.C. 32-5-11-5. It will be recalled that the owner of ten or more mineral interests in the same county, *who is making a diligent effort to preserve all of them but neglects to do so with respect to one or more of them,* does not, upon the expiration of the statutory period, automatically lose the interests with respect to which he fails to file. Such interests will only be terminated if the owner thereof fails to file within 60 days after the surface owner publishes a notice of lapse. Defendants claim that if they do not get the advantage of the "inadvertance" exception, because of their lack of ownership of ten or more mineral interests, the Act unconstitutionally discriminates against them.

It is true that not every mineral owner, whose interest is affected by the Act, is going to be able to bring himself within the provisions of section 32-5-11-5, but that fact alone does not render the clause constitutionally objectionable. The statute does make reasonable classifications and does apply to all who meet its conditions. Nothing more is required of a legislative act.

The exception is a legislative response to a problem peculiar to the Indiana mineral industry. Mineral severances in Indiana began in the middle of the last century with the coming of the coal industry. Many more were

created by the oil and gas industry early in this century. (See Polston, *Legislation Existing and Proposed Concerning Marketability of Mineral Titles,* 7 Land and Water L. Rev., (1972)). Frequently, these old conveyances cloud titles and prevent the development of mineral deposits today because the owners cannot be located. Others, however, represent interests owned by individuals or companies that very much intend to develop the minerals. A coal company may have to assemble hundreds of such interests to mine a single seam of coal, and the titles thereto may be extremely complex. Further, the industry is so tied to the electric power industry that reserves are aften acquired 20 to 50 years ahead of intended use. The legislature made a judgment that if the individual or company was making a diligent effort to preserve its interests in such a situation, the whole venture should not be brought to a standstill because of failure to preserve a single interest. The policy of the Act, to facilitate the development of mineral interests, would not be served by such a law. Yet such failures might and would likely occur as clerical misdescriptions and omissions. The choice of 10 interests — as opposed to any other number — as the point at which relief from inadvertance might be justified if diligence were not lacking, was likewise a rational legislative judgment.

But to make a general inadvertance exception would render the Act less effective. If the privilege of filing a delayed statement of claim applied to all mineral owners, instead of just those who meet the conditions of I.C. 32-5-11-5, it is possible that many interests would be preserved which were of a kind the Act was expressly designed to eliminate. Suppose for example, that a coal company went out of business in 1910 owning most of the coal

underlying the land in a given area, and that no one in the area knew who succeeded to the company's interests. It is likely that when the notices required by 32-5-11-5 began appearing in the paper, some local speculator would make it a point to find the successors in interest of the coal company and attempt to acquire their rights for the purpose of preserving them. It is likely, in fact, that many statements of claim would be filed by persons who only hoped to locate the real owner. Either activity would only further cloud the title and not further the true purpose of the Act —to encourage prompt exploitation or abandonment of mineral rights. The possibility that such things could occur is sufficient basis for the legislature to narrowly restrict the inadvertance exception to those who are making a diligent effort to comply with the statute.

The legislature can make laws that apply to different persons in different ways so long as the classification has a reasonable basis or tends in some reasonable way to further a legitimate legislative objective. In *Puget Sound Power and Light Co.* v. *Seattle* (1934), 291 U. S. 619, 624, 54 S. Ct. 542, this Court said:

> "The equal protection clause does not forbid discrimination with respect to things that are different."

and in *Brown Forman Co.* v. *Kentucky*, (1910), 217 U. S. 563, 30 S. Ct. 578:

> "If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the laws."

Wichelman v. *Messner*, (1957), 250 Minn. 88, 83 N. W. 2d 300, 71 A.L.R. 2d 816, considered the constitutionality of exceptions to the Minnesota Marketable Title Act, which has a purpose and operation similar to the Act involved in

this case. In that regard, the Court said, at page 324 of the Northwestern Reporter:

> "The constitutional prohibition . . . does not prevent the legislature from dividing a subject into classes and a classification made pursuant to a public purpose which has a rational basis upon any conceivable state of the facts, although the court does not perceive all the facts justifying the classification is not invalid. The responsibility for such classification rests primarily with the legislature and will be held proper if (a) the classification applies to and embraces all who are similarly situated . . . (b) the distinctions are not manifestly arbitrary or forceful . . . and (c) there is an evident connection between the distinctive needs peculiar to the class and the remedy or regulations therefor which the law purports to provide."

To the same effect are *Lower Vein Coal Co.* v. *Industrial Board of Indiana*, (1921), 255 U. S. 144, 41 S. Ct. 252, wherein this Court upheld an Indiana statute that distinguished between coal companies and other employers and *State Board of Tax Comm's. of Indiana* v. *Jackson*, (1931), 283 U. S. 527, 51 S. Ct. 540, in which this Court upheld a statute which taxed the owner of five or more stores at a different rate per store than one who owned less than five stores. In the latter case, this Court quoted from *Brown Forman Co.* v. *Kentucky*, (1910), 217 U. S. 563, 573.

City of New Orleans v. *Dukes*, (1976), 427 U. S. 297, 96 S. Ct. 2513, is a recent expression of this Court concerning the operation of equal protection in the economic sphere. A New Orleans ordinance prohibited the sale of food from push carts in the French Quarter except by vendors who had continually operated such a business there for at least eight years preceding a specific date. The

ordinance was defended on the ground that it was designed to preserve the distinctive charm, character and economic vitality of the French Quarter. Plaintiff, a non-qualifying vendor, argued that this was nonsense because the favored class was based strictly upon years of operation and simply created a monopoly without requiring the favored members to operate in a manner more consistent with the traditions of the Quarter than would any other vendor. This Court did not deny the validity of those arguments, but, nevertheless, held that the City could have rationally justified the ordinance (1) as a partial abolition of push cart vendors, or (2) on the view that newer businesses were less likely to have built up substantial reliance in continued operation in the area, or (3) on the ground that the vendors who had operated for over eight years had themselves become a part of the distinctive character and charm of the French Quarter. The Court said "in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment", *Dukes,* 96 S. Ct. 2516. Further, the Court emphasized that:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. * * * In short, the judiciary may not sit as a super-legislature to judge the wisdom or desirability of legislative policy determinations made in the areas that neither affect fundamental rights nor proceed along suspect lines." (96 S. Ct. 2517).

The appellants' contention in *Pond* v. *Walden* that this case involves "sensitive and fundamental rights and should therefore be subjected to the 'strict scrutiny' test" as stated in *Stanley* v. *Illionis,* (1972), 405 U. S. 645, 92 S. Ct. 1209,

31 L. Ed. 2d 551, is plainly wrong. The rights involved in this case consist of the ownership of speculative mineral interests and the statute does nothing more than impose upon such owners the obligation to keep their ownership current of record when the property is not being used. There is absolutely no basis for elevating the rights in this case to the same level as the parental rights involved in *Stanley* v. *Illinois*.

III. THE STATUTE DOES NOT IMPAIR THE OBLIGATION OF A CONTRACT

The rights which the legislation in the instant case affects are property rights. The protection of the contracts clause is directed toward rights which arise out of executory contracts. If it applies to protect all kinds of property interests on the theory that any property is, or has been, the subject matter of a contract, then the contracts clause duplicates the due process clause in this regard. The two become a single limitation on the power of the legislature to act with respect to wealth. See *Constitutionality of Retroactive Land Statutes—Indiana's Model Dormant Mineral Act*, 12 Ind. L. R. 456 (1979).

It is true that in the past there has been a tendency to assume that similar standards should be used to measure the validity of legislation in the two areas. In both situations it has been held that the prohibition, be it the due process clause with respect to property or the impairment clause with respect to contracts, is not an absolute one. Rather it is one which requires that the interference bear a reasonable relationship to a proper legislative objective.

The mineral claimants contend that two recent decisions of this Court involving the contracts clause have expanded upon this simple test. See *United States Trust*

Co. v. *New Jersey*, (1977), 432 U. S. 1, 97 S. Ct. 1505, 52 L. Ed. 92 and *Allied Structural Steel* v. *Spannaus* (1978), 438 U. S. 234, 98 S. Ct. 217, 57 L. Ed. 727. Those cases do nothing more, however, than apply the existing tests to particular situations. In fact, in *Spannaus*, the Court reconciles both cases with existing authority when it quotes from the *United States Trust Co.* case to the effect that:

> "legislation adjusting the rights and responsibilities of contracting parties must be upon reasonable conditions and of a character appropriate to the public purpose justifying its adoption."

In *Spannaus*, this Court simply did not believe that the legislation proceeded in a reasonable manner toward a proper legislative objective. The decision points out many reasons for this conclusion. Among other things, the Court noted that if the objective of the legislation was to secure pension rights to workers, it was unfair and counterproductive to discriminate against employers who had been generous in providing pension rights by imposing unreasonable additional burdens upon them. *United States Trust Co.* v. *New Jersey* is also consistent with prior authority. The State was attempting to escape its own contractual undertaking, and, in such cases, it has always been held that the legislation will be subjected to a closer scrutiny. In I Antieau, *Modern Constitutional Law* 252, it is said:

> "Without accepting any absolutist interpretations of the contract clause, one must agree that the States are held to contractual integrity by the contract clause."

It may be contended that the language of the Court in *Spannaus* and *U. S. Trust Co.*, that:

> "The severity of the impairment measures the height of the hurdle"

has resulted in a new standard for testing the constitutionality of legislation in this area; a standard which results in this Court giving less lattitude to legislatures in the area of economic regulation. Even if that be true and even if it is assumed that this newer and stricter approach is also applicable to questions arising under the due process clause, it does not follow that the act involved in the instant case is invalid because the degree of impairment in the instant case is very slight. In both *Spannaus* and *U. S. Trust Co.*, the impairment was immediate and unavoidable. In neither case could the party who was economically affected by the Act do anything to avoid the impact. In the instant case, the Act gave the affected parties two years after its effective date in which to file a simple document with the recorder of deeds and thereby completely escape the effect of the Act. A statute which gives a party a reasonable time to do an act which is of very little inconvenience to him and thereby escape any economic disadvantages cannot be said to represent a severe impairment of rights. In *El Paso* v. *Simmons*, 379 U. S. 497, 508; 85 S. Ct. 577 (1964) where this Court considered a Texas statute which retroactively terminated the theretofore statutory right to reinstate a forfeited contract to acquire land from the State, this Court said of the contracts clause:

> "Moreover, the 'economic' interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts."

Since the filing requirement is minimal, it is apparent that whether one speaks of due process or contract impairment, the constitutional standard applicable to the regulation of property rights remains today as formulated

over one hundred fifty years ago in *Jackson* v. *Lamphire*, (1830) 28 U. S. 280. The question was whether New York could pass a law invalidating plaintiff's deed and giving his land to a subsequent purchaser from the same vendor simply because he, a resident of Canada not knowing of the law (and having a deed made prior to its enactment), failed to file a suit to establish his property right within three years. Unschooled as they were in the nuances of due process, the Justices grappled in that case with impairment of contract. Nevertheless, they correctly perceived the role of the Court and of the Constitution in such matters:

> ". . . *there is no contract on the part of the state, that the priority of title shall depend solely on the principles of the common law, or that the state shall pass no law imposing on a grantee the performance of acts which were not necessary to the legal operation of his deed at the time it was delivered.* It is within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time; and the power is the same whether the deed is dated before or after the passage of the recording act. Though the effect of such a law is to render the prior deed fraudulent and void against a subsequent purchaser, it is not a law impairing the obligation of contracts; such too is the power to pass acts of limitations, and their effect. Reasons of sound policy have led to the general adoption of laws of both descriptions, and their validity cannot be questioned. *The time and manner of their operation, the exceptions to them, and the acts from which the time limited shall begin to run, will generally depend on the sound discretion of the legislature, according to the nature of the titles, the situation of the country, and the emergency which leads to their enactment.* . . .

Whether it is considered as an act of limitations, or one in the nature of a recording act, or as a law sui generis, called for by the peculiar situation of that part of the state on which it operates; we are unanimously of opinion, that it is not a law which impairs the obligation of a contract; . . .". [emphasis supplied]

CONCLUSION

The mineral claimants urge this Court to overthrow one hundred fifty years of precedent by grafting a procedural due process requirement on legislation affecting property rights. The implications are far-reaching. Where property such as bank deposits is involved, some form of official notice of regulatory changes is relatively easy since at least the names of depositors and locations of deposits are known. See, for example, *Anderson National Bank* v. *Luckett* (1944) 321 U. S. 233, 64 S. Ct. 599, 88 L. Ed. 692. Such is not the case with regard to land. Determining ownership of interests in land, as well as the whereabouts of the owners, is a tedious and time-consuming process. In the cases at bar, it was the absence of any practical source of information about such facts that prompted the legislation in the first place.

Notice of the law was a necessary presumption even in earlier years when many could not read and few had access even to daily newspaper communication. In today's world where most are literate and all have access to instant communication sources, the validity of the presumption is greater, not less. Persons owning property must still be expected to look after it and attend to the problems incident to its ownership, both legal and otherwise. To require a State to treat property rights as if they were as fundamental as the right of an accused to remain silent or to

trial by jury would indeed place a severe burden and restriction upon the State's power to pursue the public welfare in civil and economic matters.

For these reasons, Appellees submit that in the property sphere a reasonable grace period is and must remain a due process alternative. Its simplicity and effectiveness far outweigh the occasional harm to affected owners. Accordingly, Appellees respectfully request that the decision of the Indiana Supreme Court in the cases at bar be affirmed.

Respectfully submitted,

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